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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CANADA, INC. AND MERCEDES-BENZ CANADA, INC.,

Petitioners,

v.

GEORGE JAYNES, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioners DaimlerChrysler Canada, Inc. ("Daimler Canada") and Mercedes-Benz Canada, Inc. ("Mercedes Canada") respectfully file this reply to the brief in opposition filed by Respondents. Respondents do not contest the existence of a deep and lingering circuit split regarding the proper interpretation of Section 12 of the Clayton Act. Nor do they address the important constitutional, policy, and international comity and commerce implications of interpreting Section 12 to allow antitrust plaintiffs to sue a foreign corporation in any federal district court anywhere in the United States, not only under the federal antitrust laws, but also the laws of any of the fifty States that give rise to factually related and "pendent" state-law claims. *See, e.g.*, Petition at 22-27; Brief of Amici Curiae The Organization for International Investment and the Association of International Automobile Manufacturers In Support of Petitioners ("OFII/AIAM Brief") at 2-3, 6-11.

Rather, Respondents attempt to distract this Court from authoritatively resolving this important question of federal statutory law with a barrage of supposed procedural obstacles and inapt cases, none of which withstands scrutiny or prevents this Court from restoring stability to the legal environment for international commerce.

That the First Circuit failed to address this pure and controlling question of law on interlocutory appeal, unlike nearly every other federal Circuit that has been presented with it, does not prevent this Court from doing so. Because this Court could decide the merits of the Section 12 issue before any judgment had been rendered in the First Circuit, it clearly could do so where, as here, there *has* been a judgment from the Court of Appeals.

Unlike the cases relied upon by Respondents, the resolution of the question presented here would not benefit from, or be affected by, deferring review until the entry of final judg-

ment in this case. No further facts or law remain to be developed before the question posed by Petitioner Daimler Canada is squarely presented for this Court's review, because the District Court unconditionally denied Daimler Canada's motion to dismiss several months ago. The jurisdictional discovery that has taken place since then and that Respondents repeatedly cite as a reason for denying the petition for certiorari in this case could only affect Mercedes Canada's challenge to the District of Maine's assertion of personal jurisdiction over it. Yet surely if this Court concluded that Section 12 does not authorize the assertion of personal jurisdiction over Daimler Canada in Maine based only on Daimler Canada's aggregate minimum contacts with the United States as a whole, then Mercedes Canada should also be entitled to the benefit of such a conclusion. It is for that reason that Mercedes Canada has joined in Daimler Canada's petition to this Court for a writ of certiorari.

Finally, deferring review until the entry of final judgment in this case would defeat the very purpose of the defenses of personal jurisdiction and venue, which exist to protect defendants from the burden of having to defend suit in a forum with which they do not have sufficient minimum contacts or in which it would be unfair to require the defendants to appear generally. The threshold nature of these defenses provides yet another reason not to delay review of the pure question of law presented in this case.

I. This Court Clearly Can And Should Review The Merits Of The Clayton Act Section 12 Issue That The First Circuit, Unlike Its Sister Circuits, Refused To Address On Interlocutory Appeal.

1. Respondents are wrong in asserting that this Court cannot and should not review the merits of the controlling question of law presented—a question as to which there is substantial ground for difference of opinion and that was certified by the District Court here: namely, whether the second clause of Section 12 should be torn apart from the first clause of the sentence of which it is a part and combined with other

general venue statutes to permit antitrust plaintiffs to sue foreign corporations in any federal district court anywhere in the United States. *See, e.g.*, Respondents' Brief in Opposition ("Opp.") at 4-5 and n.2 (citing *Southern Ry. Co. v. King*, 217 U.S. 524 (1910), for the proposition that "if this Court were to reverse the First Circuit's ruling, it could only command that court to accept the certified order for review on the merits").

Southern Ry. Co. v. King provides no support (and Respondents offer no alternative support) for such an artificial and inefficient constriction of this Court's authority to resolve the statutory interpretation question presented in this case. In *Southern Ry. Co.*, this Court affirmed the lower courts' rejection of the defendants' Commerce Clause challenge to Georgia's railroad-crossing statute because the defendants did not adequately plead facts sufficient to raise such a challenge. *See* 217 U.S. at 536-37.[1] Here, in contrast, there is no suggestion that Petitioners inadequately pleaded the facts underlying their challenge to the District of Maine's exercise of personal jurisdiction over them. And nothing in *Southern Ry. Co.* addresses this Court's power to reach the merits of an issue certified for interlocutory appeal by a district court, nor does anything else in that case suggest that this Court cannot reach the merits of Petitioners' personal jurisdiction challenge here.

This Court undoubtedly could have decided the merits of the Section 12 issue raised in Petitioners' interlocutory appeal, even before the First Circuit entered its judgment in this case refusing to do so. *See* 28 U.S.C. § 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .") (emphasis added); 28

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[1] *See Southern Ry. Co. v. King*, 217 U.S. 524, 536-37 (1910) ("But these averments [in defendants' amended answer] are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional.").

U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."). Because this Court could have decided the merits of the Section 12 issue even before any judgment had been rendered by the First Circuit, this Court clearly has the power to do so where, as here, a judgment *has* been rendered by the Court of Appeals. Pet. App. 1a.[2]

2. This Court should exercise its power to decide the merits of the Section 12 issue not only because the standard prescribed by 28 U.S.C. § 1292(b) for an interlocutory appeal has been satisfied here, as nearly every other Circuit presented with the identical Section 12 question has determined,[3] but also because of the sharp conflict of authority

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[2] Respondents also cite dicta in this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978), as well as the Sixth Circuit's decision in *Kraus v. Board of County Road Commissioners*, 364 F.2d 919 (6th Cir. 1966), and the Eighth Circuit's decision in *Gialde v. Time, Inc.*, 480 F.2d 1295 (8th Cir. 1973), for the obvious point that the discretion of a Court of Appeals to entertain an interlocutory appeal under 28 U.S.C. § 1292(b) is broad. *See* Opp. at 5-6 and n.3. But outer-bound limits on the exercise of such discretion undoubtedly exist. *See, e.g.*, Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 346 and n. 112 (1959) (citations omitted) (suggesting that "[a] refusal of the court of appeals to allow application for appeal under § 1292(b) might thus be remedied by mandamus when discretion was abused.").

[3] *See In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 290 (3d Cir. 2004) (interlocutory appeal); *GTE New Media Servs. Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1345 (D.C. Cir. 2000) (same); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1407 (9th Cir. 1989) (same); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 580 (2d Cir. 1961) (same), *rev'd on other grounds*, 369 U.S. 463 (1962); *see also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004) (on appeal of district court's dismissal of lawsuit); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th

amongst the Circuits on this question, the commercial and legal importance of the question, and the fact that further proceedings in the District Court will not result in any further factual or legal development of the threshold defense of lack of personal jurisdiction, at least as to Daimler Canada.

The cases Respondents cite in support of their contention that this Court should not review the Section 12 issue at this time are off-point and readily distinguishable. *See* Opp. at 7-12. In each of those cases, the analogous question that this Court was asked to review simply was not presented at all, or its resolution clearly would have been significantly altered by further factual development in the courts below.

In *Simmons v. West Haven Housing Authority*, for example, this Court dismissed an appeal raising an equal protection challenge to a Connecticut statute that purportedly required indigent tenants to post a bond in order to appeal from a judgment in a summary eviction proceeding. The Court dismissed the case because it appeared that petitioner was denied waiver of the bond requirement for the independent reason that the appeal of summary eviction was "taken only for purpose of delay." 399 U.S. 510, 513 (1970) (per curiam) (citing 250 A.2d 527 (1968)). Here, there is no ambiguity as to why the District Court denied Daimler Canada's motion to dismiss for lack of personal jurisdiction.

Similarly, in *Minnick v. California Dep't of Corrections*, this Court declined to hear petitioners' challenge to the affirmative-action program that the California Department of Corrections had started to implement, because it was unclear whether such a challenge was even properly, let alone squarely, presented. 452 U.S. 105, 123-27 (1981). First, it was uncertain whether the trial court even had jurisdiction over the claims that had been asserted by petitioners in that case. *See id.* at 119 and n. 25, 126. Second, it was impossi-

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[Footnote continued from previous page]

Cir. 1988) (same); *Aro Manufacturing Co., Inc. v. Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965) (same).

ble to tell from the lower courts' opinions "whether race was considered relevant for *all* promotions or just in connection with promotions to particular positions." *Id.* at 125. Further factual findings were needed for an analysis of either alternative under the Equal Protection Clause, and further development of the record was expected to occur in a new trial ordered by the court below. *See id.* Again, here, in contrast, Petitioners undoubtedly had the right to challenge personal jurisdiction in the District of Maine, and at least Daimler Canada's challenge is squarely presented to this Court without the necessity of further proceedings below.

II. The Proper Interpretation Of Section 12 Of The Clayton Act Is An Important Issue That Is Ripe For This Court's Review.

1. Respondents wrongly assert that the Clayton Act Section 12 issue presented in this case is not ripe for review and may be mooted by the jurisdictional discovery authorized by the District Court in this case. *See* Opp. at 8-9. The pendency of jurisdictional discovery is a red herring because it was ordered only with respect to Mercedes Canada. The District Court conclusively denied Daimler Canada's motion to dismiss for lack of personal jurisdiction in its March 4, 2004 opinion and order, and it made clear the ripeness of the issue by certifying that order for interlocutory appeal. Pet. App. 17a-20a. Moreover, the District Court has never suggested, either in that order or in any subsequent opinions or statements, that its ruling as to Daimler Canada could possibly be affected by the jurisdictional discovery that it had authorized with respect to Mercedes Canada. Consequently, the record with respect to Daimler Canada's ripe challenge to personal jurisdiction in the District of Maine is fully developed. Because the correct interpretation of Section 12 could materially advance the ultimate termination of this litigation as to not only Daimler Canada but also Mercedes Canada, *see* Pet. App. 27a (District Court order certifying same), Mercedes Canada has joined in Daimler Canada's petition to this Court for a writ of certiorari.

The completeness of the record on the threshold defense of lack of personal jurisdiction sets this case apart from the authority relied upon by Respondents. Unlike *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), or *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934), no further factual development or proceedings in the lower courts could either clarify, or render unnecessary, a decision by this Court on the merits of the overbroad and erroneous interpretation of Section 12 used by the District Court to assert personal jurisdiction over Daimler Canada.

2. Even if Petitioners are ultimately vindicated on the merits of Respondents' antitrust, consumer-protection, and unjust-enrichment claims after a lengthy and costly trial in this complex class-action litigation, the very damage and injury against which the defenses of lack of personal jurisdiction and venue were designed to protect would have been inflicted upon Petitioners. *See* Petition at 27-29 (citations omitted) (explaining that the whole point of these threshold defenses is to protect non-residents from the burden of having to defend suit in the foreign forum).

Because personal jurisdiction is a threshold issue, cases such as *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372 (1893), and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), actually support review by certiorari of the Section 12 issue here. Here, "extraordinary inconvenience and embarrassment in the conduct of the cause" would result if Daimler Canada and Mercedes Canada had to wait several years until the conclusion of this complex class-action antitrust litigation to have an appellate court uphold their threshold defense that they never should have been subjected to the burdens of defending suit in the District of Maine. *American Construction Co.*, 148 U.S. at 384. "In such an exceptional case, the power and the duty of this court to require, by certiorari or otherwise, the case to be sent up for review and determination, cannot well be denied." *Id.*; *see also Hamilton-Brown Shoe*, 240 U.S. at 258 (citing *American Construction Co.*). That is why

an interlocutory appeal may be the only procedural vehicle through which the Section 12 issue presented in this case could reach this Court in any reasonably timely fashion.

3. The other cases cited by Respondents involve situations in which further factual development and proceedings in the lower courts would have significantly affected, or possibly obviated the need for, this Court's resolution of the question sought to be reviewed. In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, review by this Court of the contempt sanctions that had been levied by the district court against the union would have been premature, because the district court had not yet reconsidered whether there actually had been a contempt and, if so, whether the sanctions it had levied were appropriate, as it had been ordered to do by the Court of Appeals. 389 U.S. 327, 328 (1967) (per curiam). In contrast, here, the Court of Appeals did not require the District Court to reconsider or alter its Section 12 ruling, nor has the District Court given any indication that it will do so as to Daimler Canada.

Similarly, in *Virginia Military Institute v. United States*, the District Court had not yet considered the different options for, or ruled upon, the "'specific remedial course'" mandated by the Equal Protection Clause in that case, as it had been required to do by the Court of Appeals. 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). It therefore made sense for this Court to adhere to its usual policy of "await[ing] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Id.* Here, in contrast, awaiting such final judgment would add nothing to the District Court's ruling on the Section 12 issue that has divided the Circuits and that calls for review by this Court.

The same distinction applies to the Eighth Circuit's dismissal of the interlocutory appeal that it had initially entertained in *Paschall v. Kansas City Star Co.*, 605 F.2d 403 (8th Cir. 1979). In *Paschall*, the district-court record had been so insufficiently developed that it was impossible to tell

whether certain preliminary antitrust-standing defenses would have rendered unnecessary the judicial determination of the Sherman Act Section 2 issue that had been certified for interlocutory appeal. *See id.* at 407. Here, in contrast, there are no such preliminary hurdles to the Section 12 issue that have been erroneously decided by the District Court.

III. Review By This Court Is Warranted Given The Well-Developed Circuit Split That Exists And The Substantial Constitutional, Policy, and International Comity Implications That It Raises.

Respondents' only direct response to the Section 12 issue presented in this case, and the well-developed 3-2 circuit split that exists on this issue, is a conclusory and fleeting reference to the flawed "syntax" analysis of the Third Circuit in *In re Automobile Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004), and to the "'basic, historic difference'" between venue and service of process mentioned in the Ninth Circuit's decision in *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1179 (9th Cir. 2004). *See* Opp. at 12.

However, neither of these references comes close to refuting the existence of the deep circuit and district-court split on the proper interpretation of Section 12 described in the Petition and the OFII/AIAM Brief, the compelling textual analysis offered by courts such as the District of Columbia Circuit in *GTE New Media Servs.*, or the significant constitutional, policy, and international comity and commerce considerations that militate in favor of this Court's review. *See* Petition at 8-29; *id.* at 19-20 n. 10 (explaining the flaw in the syntactical analysis adverted to in *In re Automobile Refinishing Paint Antitrust Litigation*); OFII/AIAM Brief at 3 (explaining how the "vast and unwarranted expansion of both the district courts' jurisdiction and the potential liability of foreign corporate defendants under the laws of the 50 states, including states with which these entities have no contacts," wrought by an incorrect interpretation of Section 12, would "impose an unfair and disproportionate burden on foreign

corporations"); *id.* at 6 (noting that "[t]he conflict and confusion among the lower courts denies businesses the ability to manage or limit risk by making deliberate decisions about where they will incorporate or transact business").

As *amici curiae* OFII/AIAM have correctly observed, this Court should grant review to make clear that "Congress must act more explicitly than it has in Section 12 of the Clayton Act to impose" upon foreign corporations a "legal environment" that subjects them to suit in any district court anywhere in the United States, under not only the federal antitrust laws, but also the laws of any of the fifty States that give rise to factually related and "pendent" state-law claims. OFII/AIAM Brief at 8.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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